SUBJECT INDEX

CASES CITED

TEXT BOOK, STATE STATUTES AND STATE CONSTITUTIONAL PROVISION CITED

OPINIONS OF LOWER COURTS

Chicago, R. I. & P. Ry. Co. v. Risty, et al., 282 Fed. 364.
Risty v. Chicago, R. I. & P. Ry. Co., 297 Fed. 710.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925

No. 100

A. G. RISTY, ET AL., AS COUNTY COMMISSIONERS, ET AL., APPELLANTS

VS.

GREAT NORTHERN RAILWAY COMPANY, APPELLEE

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF APPELLEE

Great Northern Railway Company, plaintiff and appellee, filed its bill in the district court of the district of South Dakota, praying for an injunction. From a decree granting an injunction defendants and appellants appealed to the Circuit Court of Appeals of the Eighth Circuit, in which court the decree was affirmed. From the decision of the Circuit Court of Appeals defendants have appealed to this court.

This suit involves the constitutionality of the drainage ditch statutes of the state of South Dakota under both the federal and state constitutions, and also involves the regularity and validity of proceedings taken under the statutes. The facts out of which the suit arises are as follows:

STATEMENT OF THE CASE

The Big Sioux River flows from the north in a southerly direction west of the city of Sioux Falls to a point southwest of the city, thence easterly and thence northerly through the city to a point where it is intersected by the outlet of the drainage ditch or ditches in controversy.

Appellee owns and operates a line of railroad which enters the city of Sioux Falls from a northeasterly direction, extends south through the city, and runs thence southwesterly to the city of Yankton. The point on its line nearest to the drainage ditches hereinafter referred to is about one and one-half miles south of their outlet, and south of what is hereinafter referred to as the spillway. Exhibit 1, appearing on pages 222-223 of the record, is a plat showing the location of its railroad over the area here in question; the location of its two bridges (numbered respectively 150.7 and 146.0) referred to in the record, and also the location of a portion of said drainage ditch or ditches including the spillway. (R., 220-225.)

In or about the years 1907 to 1909, appellant county commissioners caused to be constructed what was then known as Drainage Ditch No. 1, having its origin at a point about three and one-half to four miles north of the city of Sioux Falls, and emptying into the Big Sioux River at a point one and one-half miles north of appellee's railroad. (R., 124-129, 220-223.)

While the proceedings for the construction of Drainage Ditch No. 1 were pending a petition was filed for the construction of what was first known as Ditch No. 2. Subsequently another petition was filed, seeking the extension of proposed Ditch No. 2, and praying that it be made a part of Ditch No. 1. Appellant county commissioners finally, by resolution, established and caused to be constructed Drainage Ditch No. 2, having its origin at a point approximately fifteen miles north of the outlet of Ditch No. 1 on the east side of the Big Sioux River, and running thence in a southerly direction, intersecting the Big Sioux River at one point and so close to the river at other points that the river subsequently cut into the ditch, and connecting with and emptying into Ditch No. 1 at its point of origin. (R., 135, 136, 242.)

Appellant county commissioners, by resolution, determined that all of the property theretofore included within what they had determined to be the area of Drainage Ditch No. 1 was also benefited by Drainage Ditch No. 2; that the two ditches were mutually interdependent and should virtually be considered as one drainage system, and

they assessed all of said property for the construction of both ditches. The system of drainage thus established was completed and paid for by assessment upon the property then deemed to be benefited which did not include any property lying south of the outlet of Ditch No. 1. No part of appellee's property was included within the drainage area thus established; appellee was given no notice of any kind of the establishment of such drainage and no attempt was made to include its property within the drainage area or to assess it for any part of the cost of the drainage. (R., 127, 136-138.)

As originally constructed and after the connection of Drainage Ditches No. 1 and 2 the outlet of Drainage Ditch No. 1 consisted merely of a concrete apron hereinafter referred to as "spillway," extending from the lower terminus of Drainage Ditch No. 1 down over an abrupt slope to the Big Sioux River at a point below the falls of the river and as heretofore stated north of appellee's line of railroad. In the year 1916, the volume of water passing through Ditches No. 1 and No. 2 washed out a portion of this concrete work with the result that the waters in the spillway were at that point uncontrolled and serious damage was threatened by the continued maintenance of the ditches in the absence of properly constructed works for the purpose of controlling and confining the waters at their outlet, it being conceded that with the ditches in the condition in which they were after the washing out of the spillway there was great danger that the Big Sioux River would be diverted from its course around the city of Sioux Falls and caused to flow through the ditches from the point of intersection some miles north of the city returning to the river at the point where the old spillway was located below the falls, thus threatening to destroy the water power of the Northern States Power Company, the water supply of the city of Sioux Falls, and seriously damage many other properties and rights. (R., 28-32.)

It appears from the answer and the undisputed evidence that the appellant county commissioners started work of some character to attempt to control the waters at the spillway and to prevent the threatened damage; that certain property owners within the area theretofore determined to be benefited by the drainage objected to this work and instituted suit in the state court to restrain the same; that thereafter a petition was filed with the appellant county commissioners seeking a change of the outlet of the Drainage Ditches No. 1 and No. 2 in such manner as to discharge the water from said ditches into what is known as Covell's Lake, situated in the northwesterly

part of the city of Sioux Falls; that thereafter the owners of property within the drainage area as theretofore determined and parties interested in the Covell's Lake project had numerous conferences with reference to the matter; that as result of such conferences and as a compromise between said parties (there being no contention or proof that appellee was a party thereto) the proceedings held under the petition last referred to were abandoned and a petition know as the petition of F. L. Blackman and others was filed, which petition is entitled "Petition to Reconstruct and Improve Drainage Ditches No. 1 and No. 2 in Minnehaha County, South Dakota, and to construct a new spillway or outlet to said Drainage Ditches No. 1 and No. 2, and to pay therefor by an assessment upon the property, persons and corporations benefited thereby." Upon this petition confessedly filed and acted upon by the appellant commissioners as a compromise between the owners of property within the drainage area and the promoters of the so-called Covell's Lake project, and not including appellee, the appellant commissioners adopted a resolution providing for its hearing and caused notice of said hearing to be published. Appellee was not named in said notice; its right of way, tracks, embankments and bridges were not referred to, and no part of its property was described. It contained nothing which could be construed as giving any notice whatever to it that any claim would be made of benefit to its property or that any attempt would be made to assess its property in such proceeding. (R., 28-32, 38, 42-64.)

Upon the return day of such notice, appellant commissioners adopted a resolution purporting to re-establish Drainage Ditches No. 1 and No. 2 under the name of Drainage Ditch No. 1 and 2, along the exact course of their previous construction and for the re-construction of the outlet or spillway. (R., 32, 51-54, 260-264.)

Purporting to act under this resolution, appellant commissioners caused Ditches No. 1 and No. 2 to be cleaned and otherwise repaired and caused the outlet or spillway thereof to be re-constructed, and pursuant to a resolution or resolutions thereafter adopted, without any notice to appellee, caused certain portions of the Big Sioux River to be straightened. The spillway was re-constructed under the cost plus plan without advertising for bids for its reconstruction in accordance with the plans finally adopted, and warrants were issued for the cost of such work, amounting, with interest, to approximately $300,000.00. (R., 33-36.)

The first intimation contained in the record of any thought of assessment of or attempt to assess any part of

appellee's property appears in a notice published in April, 1919 (Plaintiff's Exhibit A, R., 141-192) said notice being of a hearing upon the matter of equalization of benefits resulting from said Drainage Ditch No. 1 and 2 and in which certain depot grounds owned by the appellee were referred to and attempted to be apportioned benefits to the extent of a very few units. Appellant commissioners did not at that time, however, attempt to assess the right of way, tracks, embankments and bridges of appellee and such right and property were not referred to in the April, 1919, notice. Proceedings under this notice were abandoned by the appellant commissioners. (R., 192, 201.)

Subsequently and in or about the month of June, 1921, appellant commissioners adopted a resolution apportioning the benefits derived from said Drainage Ditch No. 1 and 2 and apportioned to appellee and to its right of way, tracks, embankments and bridges benefits to the extent of 613.85 units amounting, as will appear from a mathematical calculation, to approximately $5,800.00. This suit was instituted for the purpose of restraining appellants from proceeding further with the equalization of said purported benefits and from spreading an assessment upon appellee's property therefor. (R., 16-19, 36, 37, 192, 206.)

DISTRICT COURT'S DECISION (R., 79-99)

The District Court did not agree with appellee's contention that the drainage statutes of the state of South Dakota were violative of the Fourteenth Amendment to the Constitution of the United States in that they do not provide for proper notice to, and right to be heard of, property owners, and deprive them of their rights and property without due process of law, but properly held that it acquired jurisdiction not only by virtue of diversity of citizenship but because the bill involved a real and substantial question under the Constitution of the United States, and therefore proceeded to determine all the questions; (*Davis, Director General v. Wallace*, 257 U. S. 478, 66 L. ed. 325) and found, in substance, as follows:

(1) That the situation disclosed by the evidence "presented no question of the drainage of agricultural lands" but rather that of maintenance of Ditches No. 1 and No. 2 "and the prevention of the dangers threatened by the water that they were conducting down through these ditches, through this hill, into the river;" that the drainage of the agricultural lands would not have been interfered with if the spillway had not been re-constructed; that the people who constructed Ditches No. 1 and No. 2 originally were responsible for the threatened damage, and it was their

duty to maintain the ditch, "and to stop the ravages of the water cutting into it and through it;" that what was done under the pretense of proceeding under the so-called Blackman petition was merely to maintain the ditch or ditches originally constructed and that in the attempt to include additional lands in the drainage area and assess them any portion of the cost of such maintenance, appellant commissioners were acting entirely without authority of law, there being no provision in the statutes of the state of South Dakota "for the taking in of any other lands and assessing them for the maintaining of a ditch after it had been constructed and the benefits of its building have been assessed."

(2) That the forming of the so-called new ditch was simply a pretense and a subterfuge "resorted to for the sole purpose of attempting to burden the plaintiffs and others with the cost of the maintenance of the ditches theretofore constructed."

(3) That § 8489 of the South Dakota Revised Code, 1919, with reference to invalid and abandoned proceedings had no application, the proceedings for the construction of old Ditches No. 1 and No. 2 never having been held void, set aside or abandoned; and

(4) That the proceedings of the appellant commissioners in "assuming the right to constitute a new drainage district, calling it district No. 1 and 2 and to assess benefits to the property of the plaintiffs in so far as they are located in the city of Sioux Falls" were void.

The trial court further found:

(5) That even if it had found that the alleged new drainage district had been legally constituted and that the appellant commissioners had the right to extend the benefits to property outside the drainage area as originally established, appellee would still have been entitled to relief sought because "the proofs overwhelmingly bring the plaintiffs within the rule recently expressed *In re Thomas, et al v. Kansas City Southern Railway Co., et al.*" (277 Fed. 708, affirmed by this Court, 261 U. S. 481, 67 L. ed. 758) "in that the taxation that is imposed upon each of the plaintiffs is a much higher rate and upon a different basis than the tax upon land lying within the district," stating:

> "As a matter of fact no direct benefits to the property of the railways within the city are shown. It is further shown that the benefits estimated upon the plaintiff's property were upon no standard that would probably produce results approximately the same as those upon the land in the drainage district. * * * Take the railroads, different plaintiffs, there is no pretense

that the basis used had any relation to that used in fixing the value upon the lands in the district. It is admitted that the basis was wholly different from that used for the ascertaining the contribution demanded of individual owners, and I find that such difference necessarily produces manifest inequality. There is an entire absence of the equal protection of the law that must be extended to all. * * * Even admitting that this was a genuine drainage ditch for the purpose of draining agricultural lands, under the circumstances outlined in the evidence, there is no reasonable ground upon which the action of the board could be predicated. There is no pretense in this record that the railroad companies were treated like owners of agricultural lands. The discrimination is palpable, and the amount assessed simply an arbitrary assessment. These plaintiffs were not attempted to be assessed in any manner contemplated by the statute, for the payment of the costs of draining agricultural lands."

(6) That the re-construction of the spillway without change of location and the repair of the ditch, etc., "could not be viewed in the same light or as serving the same purpose as the construction of the original ditches" because the object and purpose of such work was not to drain agricultural lands but to prevent the damage threatened because of the original imperfect construction of the ditches and spillway; in other words, to prevent the destruction of the water supply of the city of Sioux Falls, the water power of the Northern States Power Company, etc., by means of the agency set in motion by the original construction, and that although such object and purpose might have constituted a public use the appellant commissioners were acting without authority of law because the applicable state constitutional provision was not self-executing and the acts of appellants lacked the necessary legislative authority.

DECISION OF CIRCUIT COURT OF APPEALS

(292 Fed. 710)

The Circuit Court of Appeals did not pass upon the Federal constitutional questions involved because, although finding them "grave, serious and doubtful," it deemed their determination not necessary "to the solution of the case," but in other respects it approved the decision of the district court and affirmed the decree restraining the assessment of appellee's property lying outside the drainage area as originally established.

SUMMARY OF ARGUMENT

PROPOSITIONS RELIED UPON BY APPELLEE AS SUSTAINING THE JUDGMENT APPEALED FROM

1. The South Dakota drainage ditch statutes are violative of the Fourteenth Amendment to the Constitution of of the United States and deprive one of rights and property without due process of law in that they provide for the taxation of property without giving the owner thereof proper notice and the right to be heard upon the question as to the validity and amount of the tax and as to whether or not such tax is in excess of the benefits.

2. Such statutes do not provide for or require the giving of any notice whatsoever to railroad companies of hearing even upon the question of equalization of benefits nor afford them any opportunity to be heard upon the question of the amount or validity of the tax upon their properties.

3. Such statutes are likewise violative of the Fourteenth Amendment to the Constitution of the United States because they do not afford to all persons the equal protection of the laws and deprive persons of their rights and property without due process of law, in that they prescribe no definite standard for determining benefits and are "of such a character that there is no reasonable presumption that substantial justice generally will be done but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred." (*Kansas City Southern Ry. Co. v. Road Imp. Dist. No. 5*, 256 U. S. 658, 65 L. ed. 1151.)

4. In this instance the application and administration of the laws in question by appellant commissioners have been so arbitrary, discriminatory, and extensively oppressive as to result, if not restrained, in depriving appellee of its property without due process of law, and in depriving it of the equal protection of the laws in violation of the Fourteenth Amendment.

5. Appellant commissioners in attempting to include appellee's property within the drainage area and assess it, acted without any authority of law and attempted in excess of their powers to create a burden upon appellee and a cloud upon the title to its property, and proceeded without right to do something not authorized by the law under which they purported to act, this being true for the following reasons:

(a) Because what they did constituted merely maintenance and repair of the ditches as originally constructed, and the statutes do not purport to give them any power

or authority to enlarge the drainage district and assess for that purpose property not originally assessed, the maintenance statute clearly providing that assessments for maintenance and repairs shall be made upon the property and in the proportions originally assessed.

(b) Because the purported establishment of a new drainage ditch in the exact location of the old ditches and construction of a new spillway in the location of the old spillway was confessedly a mere scheme or subterfuge resorted to by appellant commissioners for the purpose of enabling them to lessen the burden upon the property owners in the original drainage area, and to cast the greater part of it upon property owners not included within the drainage area or benefited by the drainage.

(c) Because it clearly appears from the record that the work for which the assessment is sought to be made, unless it be treated as the repair and maintenance of the original ditches, was done, not for the purpose of draining agricultural lands, but for the purpose of preventing damage to property that was threatened by the existence of the drainage theretofore established, and appellant commissioners were not authorized by any law of the state of South Dakota to establish a drainage district or assess property for the cost of the accomplishment of any such object or purpose.

6. It clearly appears from the record that appellee's property has derived no benefit whatever from the so-called drainage, the benefits sought to be charged to it being purely fanciful, speculative, arbitrary and out of all proportion to those sought to be charged to other properties, and not being benefits directly or indirectly derived from the drainage of agricultural lands.

ARGUMENT

I.

THE SOUTH DAKOTA DRAINAGE LAWS ARE VIOLATIVE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Appellee contended in the lower courts and still contends that the statutes under which appellant commissioners claim to have proceeded are in conflict with the Fourteenth Amendment to the Constitution of the United States and therefore void in that their enforcement will deprive persons of property without due process of law and deny to them the equal protection of the laws.

This is true because: the statutes provide no proper method for the organization of a drainage district; they

do not provide for any determination that the cost of the proposed drainage will not exceed the benefit to be derived; they do not afford property owners the right to be heard at any time or place before any tribunal upon the questions as to whether or not such cost will exceed the benefit, as to whether or not their lands and property shall be included within the drainage district, and as to the amount and validity of the tax to be assessed against their property.

This is especially true with reference to railroad companies because the statutes *provide for assessment of their property without notice to them and a right to be heard even upon the question of the equalization or apportionment of benefits.*

It must be conceded that when a legislature, for any purpose within its powers, creates a taxing district and provides that the property in such district under certain designated rules of procedure shall be assessed for the cost of the benefit of certain public work, such legislative determination is conclusive upon the question as to whether or not the property included within such district will be benefited by the improvement provided for and, with certain modifications hereinafter referred to, as to whether or not such benefits will be less than the cost, and upon such questions property owners would have no right to be heard, but the rule is different when such determination is delegated by the legislature to a subordinate body. In that event property owners are entitled to notice and hearing upon those questions.

Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763-768.
Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 41 L. ed. 369-394;
Road Improvement District No. 2 v. Missouri Pacific R. Co., 275 Fed. 600.

The conclusion reached by the District Court that due process of law is afforded, provided an opportunity to be heard with reference to the amount of the tax is given the land owner before the assessment becomes a lien upon his property, is not applicable to the situation presented by this record, because in the state of South Dakota there has been no legislative declaration or finding as to the limits of the districts to be taxed for the purpose of, or with reference to the benefits to be derived by any property or district from, drainage.

This court in *Fallbrook Irrigation District v. Bradley, supra*, stated the correct applicability of the rule laid down in *Paulson v. Portland*, 149 U. S. 30-41, 37 L. ed. 637-641,

cited by the District Court in support of its conclusion, saying:

> "It has been held in this court that the legislature has power to fix such a district for itself without any hearing as to benefits for the purpose of assessing upon the lands within the district the cost of a local public improvement. The legislature when it fixes the district itself is supposed to have made proper inquiry and to have finally and conclusively determined the fact of benefits to the land included in the district and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, i. e. the amount of the tax which he is to pay. *Paulson v. Portland*, 149 U. S. 30-41 (37: 637-641). But when as in this case the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited and the decision of that question is submitted to some tribunal (the board of supervisors in this case) the parties whose lands are those included in the petition are entitled to a hearing upon the question of benefits and to have the land excluded if the judgment of the board be against their being benefited. *Unless the legislature decide the question of benefits itself the land owner has the right to be heard upon that question before his property can be taken.*" (Italics are ours.)

It also recognized the distinction sought to be made in *Spencer v. Merchant, supra*, saying:

> "When the determination of the lands to be benefited is entrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited."

In *Road Improvement District No. 2 v. Missouri Pacific R. Co., supra*, the Circuit Court of Appeals for the Eighth Circuit said:

"But in the case in hand the legislature did not undertake itself to make the assessment on the property in this district, but it delegated that power to and imposed that duty upon the board of the district. And when the legislature delegates to a board or to commissioners the determination of the question what lands will be benefited, or what the amount of benefits to such lands will be, the inquiry becomes in its nature judicial, in such a sense that property owners are entitled to a hearing, or an opportunity to be heard, after notice, before these questions are determined."

It is, therefore, only when there has been legislative determination as to benefits, in which the determination that the benefits equal or exceed the cost is necessarily involved, that the property owner's right to be heard is limited to the question as to the proportional amount and validity of his tax. In all cases where the authority to determine such questions is delegated by the legislature to another body, jurisdiction cannot attach in such subordinate body unless the property owner, by requirement of the delegating statute, is given notice of and an opportunity to be heard upon the question of whether or not his property is or can be benefited by the improvement to an extent *equal* to or exceeding the cost thereof. A statute without such a provision fails to afford due process of law and is void.

As stated by the District Court, the South Dakota drainage statutes differ from those of most other states in that they make no provision "for the organization, at the inception of the proceeding, of a drainage district with boundaries defined, organized after notice to all property owners within the district, and endowed by statute with certain powers, consistent with the purpose for which the district is organized," and that no opportunity is given the property owner to be heard upon the question as to whether or not the benefits will equal the cost and as to whether or not the particular lands of the owner shall be included within the drainage district. It is because of the omission of these essential requirements that the statutes are unconstitutional.

By a constitutional provision of the state of South Dakota hereinafter more specifically referred to the drainage of agricultural lands is declared to be a public purpose and the legislature is authorized to provide therefor and to vest the corporate authorities of counties with power to construct drains "by special assessments upon the property benefited thereby according to benefits received" (State Constitution §6, Article XXI.)

The legislature enacted certain drainage laws, those applicable to this proceeding being found in §§ 8458 to 8491 of the South Dakota Revised Code, 1919, but in so doing merely attempted to delegate some of its powers to the county commissioners, and established certain rules of procedure. The constitutionality of these laws must be determined by the following excerpts from them, which excerpts contain all the provisions applicable to the questions under discussion and are here set out for the convenience of the court.

§ 8458. *Power of County Commissioners.* The board of county commissioners, at any regular or special session, may establish and cause to be constructed any ditch or drain; may provide for the straightening or enlargement of any watercourse or drain previously constructed, and may provide for the maintenance of such ditch, drain or watercourse whenever such ditch, drain or watercourse shall be conducive to the public health, convenience or welfare, or whenever the same shall be for the purpose of draining agricultural lands.

§ 8459. *Petition.* Such board shall act only upon a written petition signed by one or more owners of land likely to be affected by the proposed drainage. Such petition shall set forth the necessity for the drainage, a description of the proposed route by its initial and terminal points and its general course, or by its exact course in whole or in part, and a general statement of the territory likely to be affected thereby. * * * Such petition may be presented at any regular or special meeting of the board and, if sufficient in form, shall be ordered filed with the county auditor.

§ 8460. *Inspection of Proposed Route.* It shall be the duty of such board to act promptly upon all drainage petitions. Upon filing such petition the county auditor shall transmit a copy thereof to the state engineer, who, together with the board of county commissioners, shall as soon as practicable inspect the proposed route and, if in the opinion of such board and the state engineer it is necessary, the board shall cause a survey of the proposed drainage to be made by such competent surveyor as such board may select, but such survey shall be under the general supervision of the state engineer. Such survey shall primarily be for the purpose of aiding the board in determining the necessity of the proposed drainage but may be a complete survey such as will be required for the construction of the proposed drainage and assessment of its cost, or as much less as the board may require. * * *

§ 8461. *Surveyor's Report—Notice of Hearing.* The surveyor shall report in writing to the board of county commissioners and his report shall be filed with the petition. After personal inspection or after the receipt of the surveyor's report the board shall determine the exact line and width of the ditch, if the same shall not be fixed in the petition, and shall file its determination with the petition. The board shall then fix a time and place for the hearing of the petition, and shall give notice thereof by publication at least once each week for two consecutive weeks in a newspaper of the county, to be designated by the board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall describe the route of the proposed drainage and the tract of country likely to be affected thereby in general terms, the separate tracts of land through which the proposed drainage will pass and give the names of the owners thereof as appears from the records of the office of the register of deeds on the date of the filing of the petition, and shall refer to the files in the proceeding for further particulars. Such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed, and shall summon all persons deeming themselves damaged by the proposed drainage or claiming compensation for the lands proposed to be taken for the drainage to present their claims therefor at such hearing.

§ 8462. *Hearing on Petition.* At such hearing any person interested may appear and contest the statements of the petition and matters set forth in the surveyor's report and the finding of the board as to width and route. The petitioners in like manner may be heard in support of the petition. * * * * * * * * * When the board of county commissioners shall have fully heard and considered such petition and all matters in opposition to or in support of the same, it shall, if it finds the proposed drainage not conducive to the public health, convenience or welfare, or not needed or practicable for the purpose of draining agricultural lands, deny such petition. * * * * * * If it finds the drainage proposed or any variation thereof conducive to the public health, convenience or welfare, or necessary or practicable for draining agricultural lands, it shall establish the drainage and shall assess the damages sustained by each tract of land or other property through which the same shall

pass and the damages as compensation for the land taken for the route of such drainage. Any person interested may be heard in the matter of damages or compensation for land and the determination of the board of county commissioners shall be final unless an appeal therefrom, as provided in this article, shall be taken, failure to prosecute such appeal or to appear and contest an award of damages by the board to be deemed conclusively a waiver of any such damages or compensation for land taken or of any claimant's right to have the same assessed by a jury. Such drain shall be given a name and the proceedings thereafter taken shall be recorded and indexed in a book kept for that purpose in the auditor's office.

§ 8463. *Equalization of Benefits.* After the establishment of the drainage and the fixing of the damages, if any, the board of county commissioners shall fix the proportion of benefits of the proposed drainage among the lands affected and shall appoint a time and place for equalizing the same. Notice of such equalization of proportion of benefits shall be given by publication at least once in each week for two consecutive weeks in a newspaper of the county, to be designated by the board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall state the route and width of the drainage established, a description of each tract of land affected by the proposed drainage and the names of the owners of the several tracts of land as appears from the records of the office of the register of deeds, at the date of the filing of the petition, and the proportion of benefits fixed for each tract of property, taking any particular tract as a unit, and shall notify all such owners to show cause why the proporiton of benefits shall not be fixed as stated. Upon the hearing of the equalization of the proportion of benefits, the board of county commissioners shall finally equalize and fix the same according to benefits received. The proportion of benefits which any county, city, town or township may obtain by the construction of such drainage to highways or otherwise, and the benefits which any railroad company may obtain for its property by such construction, shall be fixed and equalized together with the proportion of benefits to tracts of land. Benefits to be considered in any case shall be such as accrue directly by the construction of such drainage or indirectly by virtue of such drainage being

an outlet for connection drains that may be subsequently constructed.

§ 8464. *Assessments.* After the equalization of the proportion of benefits the board may make an assessment against each tract and property affected, in proportion to the benefits as equalized, for the purpose of paying the damages and the cost of establishment thus far incurred or to be incurred. * * * At the expiration of thirty days after the making of such assessment, a copy thereof certified by the county auditor shall be filed by him with the county treasurer, but before the same is filed a notice shall be given by the board of the time when the same will be so filed, by publication at least once in each week for two consecutive weeks in a newspaper in the county to be designated by the board and by posting copies of such notice in at least three public places near the route of such drainage. Such notice shall also contain a description of the property assessed, the name of the owner as it appears in such assessment and the amount of each assessment, together with the amount assessed against the county or any city, town, township or railroad company, and shall also give the date when the assessment will become delinquent, together with the amount of penalty which will then accrue and the date from which interest will begin to run.

From the time of filing such certified copy of assessment in the treasurer's office, the same shall be due and payable and shall be valid and perpetual liens upon the respective tracts so assessed against all persons or governments except the state and the United States and, if not paid within ten days, a penalty of five per cent shall attach thereto and such assessment shall bear interest from the date of the order of the assessment at six per cent per annum payable annually. * * * * * * * * * Assessments for drainage or installments thereof shall be enforced by the county treasurer by sale of the property at the annual tax sale. * * * Instead of making an annual assessment for the purpose of paying the damages allowed in any drainage proceeding and the costs of establishment and construction, the board of county commissioners may issue warrants payable only out of the assessments to be subsequently made, the same to bear interest at six per cent per annum, and may sell such warrants at not less than the face value thereof and shall with such money so raised pay any damages allowed and costs of establish-

ment and construction. In making assessment for such drainage such warrants and the cost of issuing the same shall be included in the costs of the drainage.

§ 8467. *Assessments for Further Costs.* At any time after the damages arising from the establishment and construction of such drainage are paid and the lands for such drainage are taken, assessments may be made for further costs and expenses of construction. If the contractors are required and agree to take assessment certificates or warrants for their services, assessments need not be made until the completion of the work when an assessment shall be made for the entire balance of cost of construction, including the services of the board of county commissioners, surveyors and assistants, plans and profiles, publication and filing, and other fees, interest on bonds issued or to be issued and all expenses of every kind and nature that contribute to the establishment and construction of the drain, and notice of such assessment shall be given by the board of county commissioners in all respects as provided for the first assessment. And such assessment and the certificates issued thereon shall be in like manner perpetual liens upon the tracts assessed, interest-bearing and enforcible as such first assessment and certificates. The board of county commissioners may sell such assessment certificates at not less than par and thereby raise funds to defray the cost of establishment and construction. If there be no damages to be paid before taking the lands for such drainage, or if the damages have been paid by the proceeds of the sale of warrants, only one assessment need be made. In any case, in the discretion of the board, several assessments may be made as the work progresses. Assessments shall be paid to the county treasurer and the money therefrom shall be paid by him to the holders of assessment certificates, or upon the order of the board of county commissioners for the purpose of the particular drainage.

§ 8469. *Appeals.* An appeal shall lie from any final order or determination of the board of county commissioners establishing or denying any proposed drainage; fixing damages occasioned by the taking of lands for drainage or caused by such drainage; fixing the proportion of assessments of benefits; or accepting any drainage, to the circuit court of the county in which such drainage is located, by any one deeming himself aggrieved by any such order or determination. * * * Upon an appeal from an assessment of benefits, the court or jury shall consider not only the rela-

tive benefits to the tract in regard to which the appeal is taken, with reference to the tract taken as a unit, but shall also consider the question as to whether the tract taken as a unit is benefited or not and, if benefited, to what extent.

§ 8474. *Further Powers of Board.* Where proceedings have been had for the establishment of a ditch, drain, levee, or straightening or enlarging of a natural watercourse under the law as heretofore existing, and the improvement has been established and constructed and assessments made upon the land benefited thereby, or upon any portion thereof, for the cost of such improvement, and where the assessment so made cannot for any reason be enforced, the board shall proceed as to all lands benefited by such improvement in the same manner as if the appraisement and apportionment of benefits had never been made, and it shall proceed in the manner provided in this article, using as a basis the entire cost of such improvement, and in the assessment of such benefits account shall be taken of the amount of assessments, if any, that have been paid by those benefited and credit therefor shall be given accordingly."

It is clearly apparent from the foregoing statutes that the legislature has attempted to vest in the county commissioners the power to establish and construct a system of drainage without first doing any of the following things: creating and defining the boundaries of a drainage district: determining the approximate probable cost of the work, or determining that the benefit to the property to be included within the district and assessed for the cost of the work will equal or exceed such cost. The only finding the commissioners are required to make before proceeding with the work is that "the drainage proposed or any variation thereof" is "conducive to the public health, convenience or welfare or necessary or practicable for draining agricultural lands" (§ 8462 South Dakota Revised Code). Upon such determination alone they are authorized to proceed, *without limit as to cost,* and fully complete the work without any notice whatever to property owners or any right given to property owners to be heard at any stage of the proceedings thereafter until the hearing provided for by § 8463, South Dakota Revised Code, upon the equalization of benefits. *There is no requirement that railroad companies be given notice even of this hearing.*

Certainly such a proceeding cannot be held to constitute due process of law. A fundamental prerequisite necessary to the validity of a special assessment for bene-

fits must be the determination that such benefits will equal the cost.

Village of Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443.

Such question not having been determined by the legislature, the subordinate body to whom the matter was attempted to be delegated, in order to afford due process of law, should have been required to determine it and such determination could be properly made only after due notice and an opportunity to be heard given to all property owners whose property would eventually be subject to assessment. There is certainly as much reason for this as for the requirement that a property owner be heard upon the question as to whether or not his property was actually benefited.

It cannot be contended that it was the legislative intent that the commissioners in determining whether or not the proposed drainage would be "practicable" should base such determination upon the relation of cost to benefit because § 8460, *supra*, authorizes them to act upon a preliminary survey made merely for the purpose of aiding the board in determining the necessity of the proposed drainage, leaving it discretionary with them as to whether or not "a complete survey such as will be required for the construction of the proposed drainage and *assessment of its cost" shall be made.* (Italics are ours.)

It will be observed that the statutes provide for but two notices of hearing, that of hearing upon the original petition and surveyor's report in § 8461, and that upon the equalization of benefits in § 8463, the hearing provided for by § 8461 being merely, as we have stated, upon the sole question (exclusive of the question of damage, in which we are not interested) as to whether or not the proposed drainage will be conducive to the public health, convenience or welfare or necessary or practicable for draining agricultural lands.

The jurisdiction of the county commissioners over any particular piece of property, if acquired at all, must be acquired by virtue of the notice provided for in § 8461. The pertinent requirements of that notice are that it "shall describe the route of the proposed drainage and the tract of country likely to be affected thereby in general terms, the separate tracts of land through which the proposed drainage will pass, and give the names of the owners thereof * * *. Such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established or constructed."

In the instant case, pursuant to this statute, a notice

appearing in the printed record on pages 54-64, inclusive, was published. Appellee was not named in said notice nor its property described, nor was anything contained in the notice from which it might possibly infer that it was in any manner affected by the proceeding. On the contrary from the terms of the notice itself it was justified in assuming that it was not and would not be affected.

The notice after describing the "tract of country likely to be affected" and the separate tracts of land through which the proposed ditch would pass and stating the owners thereof, contained the following:

> "In addition to the above, notice is also given to Minnehaha County, Townships of Sioux Falls, Mapleton, Sverdrup, and Dell Rapids in said County and the City of Sioux Falls in said County on account of benefits to highways, bridges, parks and city waterworks plant in the said drainage area *and notice is also given to the Chicago, Milwaukee & St. Paul Railway Company, also to the Watertown & Sioux Falls Railway Company on account of the benefits to their rights of way within said drainage area.*"

The only railroad companies then thought by the appellant commissioners to be affected by the proceeding, being companies owning property included within the area of Drainage Ditches No. 1 and No. 2 as originally determined, were named in the notice. Certainly appellee had the right to assume that they were the only railroad companies in any manner sought to be affected.

In this connection it is interesting to note that there is no evidence "that the tract of country likely to be affected by the establishment and construction of the said proposed drainage" described in general terms in the notice was selected or determined upon by any action of the board of commissioners. The resolution providing for the hearing (R., 50) merely provides that notice be given "in accordance with" the statutes. This is followed by a purported resolution establishing the drainage (R., 51-54) and the only record we find having any reference to the tract of country "likely to be affected" is in the notice itself which never appears to have been acted upon by the board.

As to persons claiming damages to their property or compensation for the taking of it, the notice is sufficient as it describes the land through which the drainage is to pass and names the owners thereof. It may be fair to assume that all persons to whom such notice is given know whether or not they have a claim for damages but as to persons whose property is not so described and who may be affected by the proposed drainage, we contend that no

adequate notice—no notice that would constitute due process of law—is given.

How can persons owning land some miles removed from the drainage ditch or a party such as appellee owning and operating a line of railroad, no part of which is upon or in proximity to any of the land sought to be drained, know that in the judgment of the board their properties were or would be affected by the drainage? The statute does not require the naming of such persons but in general terms requires the notice to be addressed to all persons affected. Such notice assumes that the persons affected either have been determined by the board or else it places upon such persons the making of that determination at their peril. (In this instance, as hereinbefore stated, the board did determine and name in the notice the railroad companies affected, without including appellee. It is thus clearly apparent that the attempt to assess it, as stated by the District Court, was an "afterthought.")

But for what purpose are they summoned before the board? Not that they may show that their property is not affected but that they may show cause why the drainage should not be established and constructed. They are not by this language given the opportunity to show cause why their property should not be included in the drainage area. If such persons are directed to show that their property is not benefited at all, the statute gives such permission to the persons affected only for the purpose of opposing the establishment and construction of the ditch.

If one owned a piece of land not agricultural in character, with no possibility of its being made agricultural land, not subject to overflow, and of such character that it would be impossible for water to collect or stand thereon, and such land were located on the river bank and some miles away from the drainage project, it would seem to be utterly absurd that a notice in the words of the statute should be binding on him so that if he failed to appear and contest the establishment and construction of the ditch his land would be subject to an assessment for benefits therefrom. If he did appear and contest the establishment of the ditch, he would be told, in all probability, that his objection went only to the amount of benefits to be assessed against his property and would have to be urged at a subsequent hearing. But he would be in the drainage area and the ditch would be established as to him and as to his property. We do not believe that jurisdiction for such a purpose could be obtained in that manner.

The only further notice provided for is that of hearing upon equalization of benefits (§ 8463). This hearing may

be had at any time after the establishment of the drainage and the fixing of the damages and either before or after the completion of the work. In the instant case no notice of it was given until the work was completed. At this hearing nothing is determined except the proper apportionment of the benefits as between the various parties claimed to have been benefited. The question as to the amount of the tax and its validity is not involved. Whether or not the total cost of the work is in excess of the total benefits is not a relevant question and is not determined. The only question at issue is whether or not the proportion of benefits theretofore fixed by the commissioners constitutes a fair distribution of the cost of the improvement as between the various properties.

Under this statute the commissioners proceed to determine what they think is the actual benefit to a tract of land, calling such tract a unit. They then proceed to determine what they think is the actual benefit to all other tracts. Each of the amounts so arrived at is divided by the amount of benefit to the unit and each tract is assessed the number of units ascertained as the quotient. It is readily apparent that in this proceeding the cost and therefore the actual amount of the assessment is not involved. The cost per unit may be many times the benefit per unit. Upon that question there is no hearing at any stage of the drainage proceedings. If this constitutes due process of law we submit that the term has become meaningless and that the constitution has lost its power to protect.

In *Martin v. District of Columbia*, 205 U. S. 135; 51 L ed. 743, the statute under consideration required a jury to apportion the cost of a local improvement "according as each lot or part of land in such square may be benefited by the opening, widening, extending, or straightening of such alley." The court sustained the constitutionality of the act but sustained it only because it permitted "the interpretation that in any event the apportionment is to be limited to the benefit." The court said: "We think it apparent as was assumed by the court of appeals that the jury understood their duty to be to divide the whole cost among the landowners whether the benefit was equal to their share of the cost or not. It must be admitted that the language of the statute more or less lent itself to that understanding. * * * For this reason, the assessment must be quashed." The language of the South Dakota statute is quite different. It (§8464) provides that "after the equalization of the proportion of benefits the board may make an assessment against each tract or property affected *in proportion to the benefits as equalized*, for the pur-

pose of paying the damages and the cost of establishment."

This language admits of but one interpretation when it is considered in connection with the provisions of § 8463. It clearly requires the board of county commissioners to first determine the proportion of actual benefits and then to assess the entire cost in such proportion. The question of whether or not the cost exceeds the benefits is never determined and has no effect whatever upon the assessment under the South Dakota statutes.

THE STATUTES PROVIDE FOR THE ASSESSMENT OF RAILROAD PROPERTY WITHOUT ANY PROVISION FOR NOTICE TO ITS OWNERS AND A RIGHT TO BE HEARD EVEN UPON THE QUESTION OF THE EQUALIZATION OR APPORTIONMENT OF BENEFITS.

In this connection we ask the court to carefully consider and analyze § 8463 of the Revised Code of 1919, hereinbefore quoted. It requires the county commissioners to proceed as follows:

(a) After the establishment of the drainage and fixing of damages, to "fix the proportion of benefits of the proposed drainage *among the lands affected*, and to appoint a time and place for equalizing the same;"

(b) To give notice of such proportion of benefits and equalization of benefits by publication and posting;

(c) To state in the notice the route and width of the drainage, "a description *of each tract of land affected*," and the names of the owners of the "several tracts of land," and the proportion of benefits "*for each tract of property*," and to notify "all such owners" to show cause why the proportion of benefits shall not be fixed. (Italics are ours.)

The foregoing is all that this section requires the county commissioners to do with reference to the question of equalization of benefits prior to the hearing, and with reference to notice.

The section then further provides that upon the hearing, without any provision whatever for notice, the benefits (not the proportion of benefits) "which any railroad company may obtain for its property by such construction" and the proportion of benefits which any county, city, town or township may so obtain "shall be fixed and equalized *together with the proportion of benefits to tracts of land*." (Italics are ours.)

It will be observed that notice is required to be given only to the owners of the "several tracts of land." This is so plain as to scarcely admit of argument. That the right of way, embankments, bridges, and other property (not agricultural land) of railroad companies were not deemed to have been included within the term "tract of land" or

"tract of property" is clearly evidenced by the fact that the legislature found it necessary to make and made in the latter part of § 8463 special provision for ascertaining "the benefits which any railroad company may obtain for its property by such construction," and for equalizing the same "together with the *proportion of benefits to tracts of land.*" This provision is entirely superfluous if such property should be held to be included within the meaning of "a tract of land" as such term is used in the preceding portion of the statute providing for the fixing of proportion of benefits and giving of notice and in fact is inconsistent with such interpretation.

It is therefore clearly apparent that the statute purports to authorize the commissioners to determine the benefit to railroad property and assess the same without any notice or the giving of any opportunity to be heard.

The further points relied upon in questioning the Federal constitutionality of the South Dakota drainage laws and the constitutionality of the proceedings in this case are:

The statutes prescribe "no definite standard for determining benefits;"

They are "of such a character that there is no reasonable presumption that substantial justice generally will be done but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred," and

That their application and administration in this case have been so arbitrary, discriminatory and extensively oppressive as to result, if not restrained, in depriving appellee of its property without due process of law and in depriving it of the equal protection of the laws.

These propositions, which may be considered together, are supported by the following Federal decisions:

Gast Realty & Investment Co. v. Schneider Granite Co., 240 U. S. 55, 60 L. ed, 523.

Kansas City Southern Ry. Co. v. Road Improvement District Number 6, 256 U. S. 658, 65 L. ed. 1151.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220;

Road Improvement District No. 2 v. Missouri Pacific Railroad Co. (C. C. A.) 275 Fed. 600, 604.

Village of Norwood v. Baker, 172 U. S. 269; 43 L. ed. 443.

Myles Salt Co. v. Iberia Drainage District, 239 U. S. 478, 60 L. ed. 392.

Abernathy v. Fidelity Nat. Bank & Trust Co. (D. C.) 274 Fed. 801.

Thomas v. Kansas City Southern Railway (C. C. A.) 277 Fed. 708 (affirmed by the Supreme Court, 261 U. S. 481, 67 L. ed 758.

Board of Directors v. Pipe Line Co., 292 Fed. 474.

Thornton v. Road Imp. Dist. No. 1 (C. C. A.) 291 Fed. 518.

We deem it unnecessary to discuss the principles stated or quote further from the authorities cited in their support.

The important question is that of the application of these authorities to the South Dakota statutes and the acts of the commissioners as shown by this record.

So far as the statutes are concerned they prescribe absolutely no standard or rule for determining benefits. The county commissioners are simply told by the legislature to fix the proportion of benefits among the lands affected and that "benefits to be considered in any case shall be such as accrue directly by the construction of such drainage or indirectly by virtue of such drainage being an outlet for connection drains that may be subsequently constructed." (§ 8463, South Dakota Revised Code, 1919).

The statute of itself, however, is discriminatory in that it requires the county commissioners to fix with reference to "lands affected" the "proportion of benefits" and with reference to the property of railroad companies "the benefits." In the one case thus requiring the determination of a relative benefit and in the other of an actual benefit. If the benefits should materially exceed the cost, the result of the discrimination would be most obvious.

It is our contention that the law is unconstitutional because it fixes no standard or method for the determination of benefits; that its operation naturally results in the use of arbitrary and discriminatory measures, and that "there is no reasonable presumption that substantial justice generally will be done."

This contention is sustained by the conduct of the appellant commissioners in this case. It clearly appears from the record that Drainage Ditches No. 1 and No. 2 were completely established, put in operation, and paid for several years prior to the institution of the proceedings here complained of, by assessment of the property then deemed to be benefited thereby and thus included within their drainage area, *no part of appellee's property being then thought to be affected;* that after all this had been done and while these ditches were presumably performing the function for which they had been constructed they became out of repair, the spillway or outlet washed out, and because the Big Sioux River forms what might be called a horse-shoe

bend around the city of Sioux Falls, the opening end of the horse-shoe being connected by the drainage ditches, there was great danger, after the washing out of the spillway, that the entire course of the river would be diverted from its channel through the cut-off of the ditch, thus destroying the water supply of the city of Sioux Falls, and the water power of the Northern States Power Co., and causing much other great damage; and the appellant commissioners were naturally forced to the conclusion that something must be done—not to take care of the drainage, there being no evidence that it was being interfered with—but to prevent the machinery which they had set in motion for drainage purposes from destroying the rights and property of those not responsible for its existence. It likewise conclusively appears from the answer of the appellant commissioners that the owners of property within the drainage area became much exercised, that various meetings were held, and that finally, pursuant to an agreement among such property owners and as a compromise measure, proceedings were started which resulted in the pretended establishment over exactly the same lines as the ditches then constructed of a new ditch to be known as Drainage Ditch No. 1 and 2. It is apparent that this aptly termed "subterfuge" was resorted to for the sole and only purpose of attempting to lay a foundation which would permit appellant commissioners to assess the owners of the property and rights the destruction of which was threatened by the existence of the then drainage project, and the owners of other property outside the drainage area, as originally established, a great proportion of the cost of the work necessary to be done in order to avoid the threatened injury, and thus lessen the burden upon the property owners responsible in the first instance for the drainage and who confessedly planned the scheme which the appellant commissioners adopted "as a compromise."

It is evident that the entire proceeding was in bad faith, possibly not intentionally so upon the part of the commissioners but so in fact. The proceedings of the commissioners were purely arbitrary and discriminatory.

All this of course has nothing to do with the method of assessment of proportion of benefits, but the appellant commissioners proceeded to attempt to perform their alleged duties in that respect in the same arbitrary and discriminatory manner.

Appellee owns no agricultural land which is sought to be assessed. Its property in question consists of its station grounds in the city of Sioux Falls and a portion of its right of way, embankment, and bridges, all confessedly out-

side the drainage area as originally established. (R., 18, 19, 224.)

Appellant commissioners in determining the proportion of benefits to the various tracts of land and the alleged benefit to the property of appellee proceeded as follows. They employed an engineer, one Herman Rettinghouse, to make a topographical survey of the district he thought might be included within the drainage area for the purpose of preparing a map and furnishing data to the board that would enable it to fix the benefits. (R., 281-282.) This engineer selected one acre of agricultural land as a unit. Appellant commissioners decided that the acre so selected was worth $25.00 more after than it was before the construction of the drainage, thus determining that the value of the benefit to the unit was $25.00. All the agricultural land was assessed in relation to the unit and in the same manner (R., 278, 284, 285). In determining the alleged benefit to the railroad and other property not agricultural lands, an entirely different method was used. We quote from the testimony of the engineer, Rettinghouse:

"I am familiar with the cost of construction and upkeep of highways. In arriving at the benefit to the highways within this drainage area, we estimated the benefits in this way. There is a certain amount of annual maintenance necessary for any road and there is more than that amount necessary under flood conditions. That is to say, a road that is periodically flooded as against a road that never is flooded. The difference in the estimated cost of maintenance was capitalized, or represented the interest on a certain sum of money, and we considered the capitalized portion as a real benefit. * * * We divided the amount arrived at by the value of the unit of $25.00, thereby obtaining the number of units as a proportional benefit for these roads. The sum we divided by the unit represented the capitalized value to that part of the highway; we applied the same method to the streets and highways of the city of Sioux Falls. We did not apply the acreage basis to the city property, excepting possibly the grounds where the water works are located. In applying the benefit to the unit and what the board took into consideration as elements of benefit to the Milwaukee Railway Company, we took into consideration the fact that in the first place there were practically three elements. First was the right-of-way on the acreage basis, which was estimated in proportion to the adjacent lands; second, that it was possible to shorten or abandon certain bridges. In order to determine the bene-

fits derived therefrom is simply a mathematical proposition. It costs a certain amount of money each year in order to maintain a bridge, whether it is a pile bridge or steel bridge. We know how long these structures will last. We figure the cost of a bridge and divide it by the number of years in order to get the amount that is necessary to be extended each year. Taking the amount in dollars and cents multiplied by the length of the bridge and divide that and capitalize that at seven per cent, which is the usual rate of interest, and that determines the amount of benefit. This was the second element. The third element is the fact that by reason of the flooding of the territory in which railroads are located, washouts often occur. We obtained data and from my personal knowledge and experience I have a very good idea of what it costs to repair washouts periodically appearing and we estimated as close as possible how much it would amount to every year and capitalized that amount again. Again as an additional element, a roadbed is solidified or made stronger by not being subject to floods. A roadbed that is constantly or for great lengths of time subjected to submersion is certainly weakened, and again, so far as humanly possible we figured the amount of benefits in dollars and cents and after getting all of these results or capitalized amounts, we divided that by 25 as our measure and determined the number of units of benefit. That system and general method and plan was used to determine the amount of benefits that each railroad received from these separate elements." (R., 285-286.)

He further testified that appellee had 2.4 acres of right-of-way considered benefited; also "one-fifth of a mile of track, two bridges protected, and 315 feet approximately of bridge that might be abandoned," and that these items were benefited because the drainage ditch in his opinion diverted a certain estimated amount of the flood waters of the Big Sioux River from the river (R., 286-288).

C. T. Charnock, appellant commissioner, testified:

"In assessing the railroads, we took the land that the railroad companies owned into consideration first, then the railroad itself, and then the culverts and bridges. The acreage that the railroad companies owned was only one element taken into consideration, and it was all assessed upon the unit plan. We took in the mileage but mileage was not the only element taken into consideration. We did not use the valuation of the railroads but we used the valuation of the benefits that

we thought the railroads would receive from it. The board went over the proposition with the engineer and he figured out the method to use and it was approved by the board. *We accepted his figures.* The engineer figured the proportion of bridges that could be saved by diverting the water through the spillway, and that was computed in dollars and cents, and divided by 25, which made so many units. The whole system was figured on that plan. All of the different elements of benefit were figured up and added together. The engineer showed us what benefits this would be, what it would amount to, and that is the way we handled it, by the $25.00 unit, the same as we did the farms. It was all figured out for us on paper." (R., 279-280.)

It appears from the evidence of C. M. Bassett (R., 224-226) that the engineer, Rettinghouse, based his estimate of benefits to appellee upon the conclusion that because of the existence of the drainage appellee could shorten one of its bridges approximately 323 feet and he apparently attempted to figure and capitalize the saving in maintenance.

It is quite apparent that no uniformity of assessment could possibly result from the use of the methods resorted to. The proportion of benefit if any sustained by the railroad companies to that sustained by the agricultural lands could not possibly be ascertained. The method resorted to was so lacking in foundation, so vague, indefinite, speculative, arbitrary, and discriminatory as certainly not to afford due process of law.

This is especially true in view of the fact that the record contains not a word of evidence tending to show that the property of appellee is or was affected in the slightest degree by the existence of the drainage system. The engineer, Rettinghouse, based his opinion as to benefits upon the assumption that the ditch, acting as a flood water by-pass, would divert a certain estimated amount of the flood waters of the river and prevent them from being carried by the river past the city of Sioux Falls and down to appellee's right-of-way and bridges in question, but he admitted, upon cross-examination, that he was not a hydro-electric engineer; that he did not know the capacity of the ditch except that he assumed that its capacity was some 2600 to 3000 cubic feet per second; that he did not know its capacity at the point where it was taking the waters out of the river; that he did not know how much of the water discharged by the ditch at the outlet was flood water or how much was water drained from adjacent lands. (R., 289-290.) In short, he admitted that he knew no facts whatever upon which to base his opinion with reference

to the amount of the benefits. Such opinion was based entirely upon the unwarranted and unsupported assumption that the ditch would carry 2600 to 3000 cubic feet per second of the flood waters of the Big Sioux River.

The record, however, furnishes further conclusive proof that the appellant commissioners in these proceedings were not acting pursuant to any definite standard for determining benefits. In March, 1919, they passed a resolution attempting to fix the proportion of benefits from the same work now under consideration and published a notice (Plaintiff's Exhibit A, R., 141-192). This proceeding was subsequently abandoned because of certain defects but it is of value in comparison with the proportion of benefits made in 1921 for approximately the same work as illustrating the manner in which the law was attempted to be applied and as throwing light upon the query as to whether or not the attempted application of the law was arbitrary and discriminatory.

The chairman of the appellant board of county commissioners testified that the commissioners adopted the same method of determining the benefits in 1919 that they did in 1921 (R., 196). He further testified that he was not certain whether the approximate cost of each unit used in 1919 was $80.00 to $85.00 or $7.50 to $8.00 per acre, although in fairness to him as well as to the court we state that it appears from the record that the then unit was a ten-acre tract and as then used probably represented, as may be determined by a mathematical calculation, an approximate cost of about $80.00.

A comparison of the two resolutions without other evidence furnishes, as we have said, conclusive proof of the speculative and arbitrary application of the law. The proportion of benefits assessed to each of the railroad companies mentioned in the 1919 apportionment was several times less than its apportionment for the same benefit in 1921. In 1919 it appears from the notice in evidence (Plaintiff's Exhibit A, R., 141-192) that the assessment of the various railway companies then considered to be benefited was made purely upon a mileage basis; the mileage of each company is given in the notice and the several proportions of benefits assessed bear the same proportion to each other as the mileage of each company bears to that of the other. In arriving at the proportion of benefits for the same work two years later, it conclusively appears that the mileage was given very little consideration. In the proportion of benefits attempted to be made in 1919, the track, right-of-way, and bridges of the Great Northern Railway Company and the hydro-electric plant and the water rights of the

Northern States Power Company were given no consideration whatsoever, although now an attempt is made to proportion benefits to the Northern States Power Company to the amount of approximately $50,000.00, and, as we have said, to the Great Northern Railway Company to the amount of approximately $5,800.00.

If substantial justice was done in 1919, it certainly was not done in 1921, and if done in 1921, it was not done under the law as applied in 1919. The conclusion must necessarily follow and scarcely bears stating that the method employed for ascertaining the benefits was so speculative and arbitrary as, if not restrained, to deprive appellee of its property without due process of law and deny it the equal protection of the laws. The District Court was fully justified in reaching the following conclusion:

> "As a matter of fact no direct benefits to the property of the railways within the city are shown. It is further shown that the benefits estimated upon the plaintiff's property were upon no standard that would probably produce results approximately the same as those upon the land in the drainage district. * * * Take the railroads, different plaintiffs, there is no pretense that the basis used had any relation to that used in fixing the value upon the lands in the district. It is admitted that the basis was wholly different from that used for ascertaining the contribution demanded of individual owners, and I find that such difference necessarily produces manifest inequality. There is an entire absence of the equal protection of the law that must be extended to all. Referring to the testimony showing the manner of making assessments and the amount in a general way: I think it fairly appears from the record in the case that the contention of the plaintiffs that the attempt to assess the property of these plaintiffs was an afterthought. It, in my judgment, is established that they could not be benefited, even admitting that this was a genuine drainage ditch for the purpose of draining agricultural lands, under the circumstances outlined in the evidence, there is no reasonable ground upon which the action of the board could be predicated. There is no pretense in this record that the railroad companies were treated like owners of agricultural lands. The discrimination is palpable, and the amount assessed simply an arbitrary assessment. These plaintiffs were not attempted to be assessed in any manner contemplated by the statute, for the payment of the costs of draining agricultural lands."

II.

THE PROCEEDINGS OF APPELLANT COMMISSIONERS COMPLAINED OF AND SOUGHT TO BE RESTRAINED WERE NOT AUTHORIZED BY THE STATE LAW AND CONSTITUTED THE EXERCISE BY THEM OF PRETENDED AUTHORITY AND POWERS NOT VESTED IN THEM BY ANY STATUTE OF THE STATE.

This involves the consideration of the following questions: whether such proceedings were not a mere subterfuge for the purpose of attempting to force appellee and others whose property was not within the original drainage area to bear a large portion of the expense of maintaining and repairing the ditches already constructed; whether such proceedings were valid proceedings resulting in the establishment of new drainage; whether the work done under them was but the necessary work for the repair and maintenance of the ditches already constructed; and whether if the proceedings were in good faith for the purpose of establishing a new ditch the actual purpose was drainage or some other public use. These various propositions are somewhat interwoven and will be treated together.

There is ample ground for the finding of the District Court that the situation existing in 1916 presented no question of the drainage of agricultural lands; that it presented no question other than the duty of the appellant commissioners to maintain and repair the ditches theretofore constructed; that the attempted formation of the new ditch "was simply a pretense and that the plaintiff's pleading that it was a subterfuge is supported by the proof, resorted to for the sole purpose of attempting to burden the plaintiffs and others with the cost of the maintenance of the ditches theretofore constructed."

It is not necessary even to resort to the evidence to sustain these findings. The answer of appellant commissioners is sufficient of itself. We refer particularly to paragraphs Ninth and Tenth (R., 28-32) and to the following allegation contained in paragraph VIII, of the so-called affirmative defense "and (defendants) further allege that the original petition for said drainage ditch, river cut-offs and spillway hereinbefore mentioned was a compromise between said petitioners therefor and others affected thereby as hereinbefore set forth" (R., 38).

The pleading that the proceedings were had "with the consent and acquiescence of this plaintiff" is not supported by any evidence.

The answer shows the situation to be exactly what

we claim. The ditches had been constructed; they had become filled with mud and sand; the spillway had proven imperfect and inadequate; it had washed out with the result that there was imminent danger of the waters in the ditch, unless the spillway should be repaired and the waters properly controlled, causing great damage to property and rights outside the drainage area; appellant commissioners at once commenced to work to control the waters; certain property owners within the drainage area instituted an action to restrain them; these property owners conferred and as a result of such conferences a proceeding was commenced for the purpose of abandoning the spillway and establishing a new outlet connecting with what is known as Covell's Lake; further conferences were held resulting in an agreement that the Covell's Lake proceeding should be abandoned (and, as admitted by appellants in their answer *"the same were abandoned accordingly"*) and resulting in the further agreement "that a new petition should be filed and new proceedings instituted *for the re-establishment of said Drainage Ditches No. 1 and No. 2 and the reconstruction and improvement thereof* and the re-establishment and the re-construction of the outlet to said ditches and for the establishment and construction of a new spillway to *properly control and take care of the waters flowing through said drainage ditches and for the enlargement of said drainage district*," and that thereafter "*and in accordance with said agreement*" the petition, which is the alleged foundation for the proceedings in question, was filed as a "compromise between the said petitioners therefor and others affected thereby."

In view of the situation thus pleaded and also clearly shown by the evidence, the commissioners had but one duty. That duty was to proceed to repair and maintain the ditches already constructed, so that they might continue to perform their functions without danger to property outside the area. They should have proceeded under § 8470, South Dakota Revised Code, 1919, which is as follows:

> "For the cleaning and maintenance of any drainage established under the provisions of this article, assessments may be made upon the land owners affected in the proportions determined for such drainage at any time upon the petition of any person setting forth the necessity thereof, and after due inspection by the board of county commissioners such assessments shall be made as other assessments for the construction of drainage, certificates may be issued thereon and such assessments and certificates shall be liens, interest-bearing, perpetual and enforcible, in all respects as original as-

sessments and may be sold at not less than par by the board of county Commissioners, turned over to persons contracting for such cleaning and maintenance, or may be collected directly by the board of county commissioners."

Under this section the cost should have been assessed and assessments made "upon the landowners affected in the proportion determined for such drainage." This was the only power the commissioners had.

There is no provision in the South Dakota statutes for extending the boundaries of a drainage area once determined and assessed, but it is contended that the proceedings were pursuant to the provisions of § 8489, South Dakota Revised Code, 1919, having reference to "Invalid or Abandoned Proceedings." Such contention is not tenable because the evidence clearly shows that the original proceedings had not been "enjoined, vacated, set aside, declared void, dismissed, or voluntarily abandoned." There was no pretense of abandoning the old ditches. It is claimed that the spillway was abandoned by the resolution adopted in the so-called "Covell's Lake" proceeding. Even if this were true it did not operate as an abandonment of the ditches and appellants allege in their answer that the entire Covell's Lake proceeding was agreed to be abandoned and *was abandoned.* The withdrawal of the Covell's Lake proposition left the original ditches in existence, unaffected by these abandoned proceedings.

The District Court was fully justified in its conclusion as follows:

"When this river cut through into the ditch, when the ditch became clogged in places and was not wide enough in others, when the spillway washed out by the force of the water they were conducting down the ditch, and the cutting of the bluff began and large areas of land were being washed away, and the other dangers were threatened, there was only one proposition presented to the commissioners, and that was one of maintenance; was one of taking care of the water that they were conducting down these two ditches, No. 1 and No. 2.

"Instead of proceeding frankly to maintain the ditches they had established in the manner provided by statute; instead of carrying out the obligations they had assumed when they brought the water down through these ditches, and attempted to deliver it through this bluff into the river; instead of proceeding regularly under this statute to do that which it was their duty to do; instead of performing the obligation that they had as-

sumed when they established the ditches, that of maintaining them, they proceeded to act upon the assumption that because they had conducted the water down into these ditches, and because of the inefficient manner in which they had constructed the ditches and built the spillway, and all of these dangers were threatened, therefore, the plaintiffs, and others in Sioux Falls, were necessarily to be damaged. And, although a proper maintenance of these two ditches No. 1 and No. 2, would stop the damage, would prevent any danger, the Commissioners evidently reasoned that because the plaintiffs and others in Sioux Falls were in danger, they must pay for the repair of these ditches. That could not be done by simply saying the ditches shall be repaired and the City of Sioux Falls, the plaintiffs, and others, shall pay for it, or pay a part of it, and therefore, they proceeded to do indirectly what it was conceded they could not do directly. In other words they then began to look around and see what they would do in the way of taking care of the water and stopping these dangers.

"At first it was proposed to change the spillway and conduct the water down in a southerly direction, through a slough or lake, into the river west of the City, and save the great fall that is involved at the point where the water enters the river from the spillway northeast of the city.

"This was abandoned and they finally then pretended to act under a statute authorizing the abandonment of ditches. As a matter of fact there was no abandonment in good faith. No attempt to abandon the ditches. In fact, the reading of the resolution shows it was simply that they abandoned the spillway. That they filed a petition which was headed, 'To reconstruct and improve Drainage Ditches No. 1 and No. 2, Minnehaha County, South Dakota, and to construct a new spillway or outlet to said Drainage Ditches No. 1 and No. 2, and to pay therefor by assessment upon the property, persons and corporations benefited thereby.'

"This petition was filed in July, 1916, with the Board of County Commissioners. There had never been an abandonment of Ditch No. 1 and Ditch No. 2. There had been a pretended abandonment of the spillway. But the Commissioners proceeded then to construct a proper spillway on the identical location of the old one. In other words, no change whatever was made in the two ditches, No. 1 and No. 2, except to properly construct an efficient, adequate, substantial spillway, and

prevent the river cutting from its bed into the ditch, cleaning out the ditch and repairing it, changing the gates at the head of the ditch where the flood waters were taken from the river.

"Upon this petition, for this purpose, the Board of Commissioners assumed authority and power to re-christen this Ditch No. 1 and Ditch No. 2, and call it Ditch No. 1 and 2, and for the purpose of making these repairs and maintaining the old ditches under the new name, proceeded as if no ditch had been established, and as if the Ditches No. 1 and No. 2 were not in existence, and as if no obligation had been assumed by the drainage districts when they diverted the water down through the bluffs to the river, and proceeded to make the repairs and to reach out and say that the various plaintiffs were benefited. Instead of charging the repairs and maintenance of the ditches to those who were responsible for their construction under the provisions of the statutes above referred to, the Commissioners proceeded to assume the right and authority to constitute a new drainage ditch without any abandonment of the old ditches, with no thought of using new or different drainage in any way, except to maintain them and to perfect that which had been inefficiently constructed, with no thought or purpose except to repair the damage that had already been done, and prevent future damage.

"Under these circumstances, I am of the opinion that the Commissioners were acting entirely without authority of law. There is no provision in the statutes of the State of South Dakota for the taking in of any other lands and assessing them, for the maintaining of a ditch after it has been constructed, and the benefits of its building have been assessed.

"I am of the opinion that the forming of this new ditch was simply a pretense, and that the plaintiff's pleading that it was a subterfuge is supported by the proof, resorted to for the sole purpose of attempting to burden the plaintiffs and others with the cost of the maintenance of the ditches theretofore constructed.

"I am of the opinion that Section 8489 of said Revised Statutes, in regard to invalid and abandoned proceedings is not applicable to any situation such as existed here. That section has reference to the abandonment of a ditch that has been enjoined, vacated, set aside or declared void, and specifically provides for the re-establishment of a ditch over the same territory, and that the new ditch shall assume the expenses paid on

the old ditch, and give credit for any payment made upon the old ditch by people benefited. No such proceeding was attempted to be followed in this case. The proceedings establishing old ditches No. 1 and No. 2 have never been held void, never been set aside, never been abandoned. They are in force today and are responsible for the manner in which the ditches were constructed and for any damages that result from their negligence.

"Under these circumstances the Board of County Commissioners had absolutely no authority, no right or color of right, were not acting under the provision of any statute of the State when they assumed the right to reach out and attempt to assess the benefits for the repair and maintenance of said ditches against the property of the various plaintiffs. They were mere trespassers, for the reason that no drainage Ditch No. 1 and 2 was ever established and has no existence.

"I am of the opinion that the proceedings of the Board of Commissioners in the repair and maintenance of these ditches, No. 1 and No. 2, by assuming the right to constitute a new drainage district, calling it District No. 1 and 2, and to assess benefits to the property of the plaintiffs, insofar as they are located in the city of Sioux Falls, are void."

The Circuit Court of Appeals, in its opinion in this case, quoted with distinct and emphatic approval the last two preceding paragraphs. (*Risty v. C. R. I. & P. Ry Co.*, 297 Fed. 710.)

If it be contended that the new proceedings constituted anything more than the necessary maintenance and repair of the ditches then it must conclusively appear that such purpose or purposes consisted of the by-passing of the flood waters of the Big Sioux River through the cut-off created by the ditch properly repaired and maintained and of preventing the threatened damage to the water supply of the city of Sioux Falls, the water power of the Northern States Power Company, etc., and if this be true appellant commissioners acted without authority or color of right because § 6 of Article XXI of the South Dakota State Constitution authorizing the drainage of lands "for any public use" has never been made effective by appropriate legislation.

This section is as follows:

"The drainage of agricultural lands is hereby declared to be a public purpose and the legislature may provide therefor, and *may provide for the organization of drainage districts for the drainage of lands for any public*

use, and may vest the corporate authorities thereof, and the corporate authorities of counties, townships and municipalities, with power to construct levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this state, by special assessments upon the property benefited thereby according to benefits received." (Italics are ours.)

The dual nature of this constitutional provision should be carefully observed. It first declares the drainage of agricultural lands to be a public purpose and that the legislature may provide therefor, and then declares that the legislature may also "provide *for the organization of drainage districts* for the drainage of lands for any public use." It is clear that the term "drainage districts" as so used contemplates a drainage district so organized as to constitute a corporate entity because the constitutional provision under consideration further provides for the vesting of certain powers in "the corporate authorities thereof."

It may be that the constitution authorizes provision to be made for the drainage of agricultural lands without the establishment of corporate drainage districts but it must be conceded that for the drainage of land for any other purpose or use the lgeislature must first provide for drainage districts in such manner as to constitute such districts corporate entities, having corporate authorities who might be vested with the power to construct the drainage. There having been no such legislation, the only provision of the constitution that the legislature has attempted to make operative is that referring to the drainage of agricultural lands, and insofar as the ditches and spillway under consideration were constructed or purported to have been constructed for any purpose other than the drainage of agricultural lands, they were so constructed without any warrant of law whatsoever, and the entire proceeding is void under the state constitution.

In construing this section of the state constitution, the Circuit Court of Appeals said: "We are satisfied that under the South Dakota constitution § 6, Article XXI., the drainage of agricultural lands must be carried out by drainage districts, and no legislation at the time of these proceedings had been provided for the establishment of such drainage districts. Whichever way, therefore, the matter is viewed, the Board was acting without legal authority in its proportionment of benefits and threatened assessment of taxes." (*Risty v. C. R. I. & P. Ry. Co.*, 297 Fed. 710, 717.)

It should be borne in mind in this connection that appellants claim no possibility of any benefit to appellee's prop-

erty other than that they say will be derived because of the by-passing of the flood waters of the river through the ditch cut-off. The origin of the ditch is approximately fifteen miles north of the city of Sioux Falls. Its outlet is approximately one and one-half miles north of any point upon appellee's railroad. The situation will be readily ascertained by reference to Great Northern Exhibit 1 (R., 222). The tract of country originally included within the area and drained by the ditch lies entirely north of any part of appellee's property and, as has been suggested, the claim of benefit to the property not in the original area and lying south of the ditch is based solely upon the alleged diversion of the water from the river at a point or points north of Sioux Falls and carrying it through the ditch and emptying it into the river through the spillway, thus preventing a certain amount of the waters of the river from being carried by the river around the city and back to the outlet of the spillway. As stated before, the record contains no foundation in fact for this theory, and if such is the purpose of the ditch that purpose is not the drainage of agricultural land.

III.

APPELLEE'S PROPERTY HAS RECEIVED NO BENEFIT EITHER DIRECT OR INDIRECT FROM THE SO-CALLED DRAINAGE

The arbitrary, fanciful and speculative method resorted to by appellant commissioners in determining that appellee's property was benefited has been discussed. The trial court's conclusion that it was not benefited at all is fully sustained by the record—particularly by the undisputed evidence of the witnesses C. M. Bassett and Thomas Simpson.

Mr. Bassett testified:

"I have been a civil engineer 24 years; I am assistant engineer of the Great Northern Railway Company; I have been in its engineering department 9 years; at the present time I have jurisdiction of the entire Sioux City Division, including all of Minnehaha County, South Dakota; I have been in charge of that Division since the spring of 1916; during that period of time I have made frequent trips to Sioux Falls, and over the lines throughout Minnehaha County; for two years 1916-17 I was in Sioux Falls practically all the time; since then I have been here practically every week. I am familiar with what is known as drainage ditch Number 1 and 2, and the spillway; I am also assistant engineer of the Watertown and Sioux Falls Railroad company; its line is located along the ditch for about 3½ miles; every spring

I have been to the spillway; then I have been over the entire line of the ditch and looked at the various headworks and retaining dams; the line of the Great Northern enters the city of Sioux Falls from a northeasterly direction at a point about a mile and a half from the mouth of the spillway; that is the nearest point on the line of the Great Northern to the mouth of the spillway; the course of the line of the Great Northern as it goes through the city of Sioux Falls and around south of the city and down through Section 31 is as follows:
We enter in a northeasterly direction and then through town we go practically north and south and then we swing southeasterly (southwesterly) towards Yankton. * * * I am familiar in a general way with the channel and banks of the Big Sioux River from a point near our bridge in the City of Sioux Falls; the North bridge down to and through Section 31; to the south of town the banks of the river are well defined; there is a deep channel there and the river is confined to that channel, through town there is a greater chance; the channel is wider and the banks are not so steep; as you go further north the channel again deepens and it is confined, the valley is narrowed considerably south of town. * * * Basing my answer upon my knowledge of drainage ditch No. 1 and 2, the spillway, the location and construction of the tracks, bridges and embankments of the Great Northern Railroad Company, and my knowledge of the waters in the Big Sioux River, in my opinion no benefit results to such right-of-way, tracks, bridges, embankments or station grounds from drainage ditch No. 1 and 2 including the spillway; no part of the right-of-way, tracks or bridges within the area in question to my knowledge have ever been flooded by the waters of the Big Sioux River; we have a plan drawn up for a new steel bridge at bridge 146 which provides for shortening of fifty feet of that bridge and putting in deck girders which are much lower and nearer the water; we considered that owing to the fact that we are lowering the steel we would have to provide practically the same opening we have there now; in planning to shorten the bridge fifty feet we did not take into consideration the existence of the drainage ditch; the present height of the track on this bridge above what I understand to be the high water mark of the Big Sioux River, according to our best record is eleven feet; if I were planning to construct new bridges in question on the Great Northern, or to rebuild them, in determining the sizes of the openings from an engineer-

ing standpoint, I would not take into consideration the existence of drainage ditch No. 1 and 2, because my observation has been that before when the spillway went out in 1916, and the water conditions have been just the same; I consider there is great danger as the spillway constructed now of its going out, and there is danger that they will have to close the ditch and turn the water back into the original channel; I would not take it into consideration even if the ditch and spillway were working at capacity; I don't think it takes enough water out of the river to make any material difference; I would plan new openings without considering the ditch and considering the highest possible water in the river; I would consider it bad engineering to plan otherwise. * * * Along the right of way south of town we have an embankment about 1800 feet long; bridge 150-7; it is about 16 feet deep; side slopes approximately one and one-half to one, approximately fifteen feet high; the toe is protected in some places with rip rap, and it is now overgrown with grass and weeds; that embankment is so constructed as to withstand any possible flood conditions in this neighborhood." (R., 220-228.)

Mr. Simpson testified:

"I have lived in Sioux Falls twenty-seven years; I am general agent of the Great Northern Railway Company at Sioux Falls, and have been its agent for twenty-seven years; I am familiar with the line of the Great northern included within the area in question here in Section 16, 27, and 31; during such twenty-seven year period no part of the tracks, bridges or right-of-way of the Great Northern Railway within that area has been flooded; we have had no trouble during that period of time from high water; the station of the Great Northern is east of the river; I have lived on the west side of the river twenty-seven years; the depot has been located where it is now approximately fifteen years; during that time I have crossed the Big Sioux River several times a day and I have not observed any appreciable difference in the flow of the Big Sioux River before and after the construction of the spillway." (R., 228-229.)

Under the title "As to Benefits" on pages 47 and 48 of Appellants' Brief, we find the following statement: "Mr. Bassett testified for plaintiff that on the Watertown & Sioux Falls line, a part of the Great Northern system, they are flooded just south of the city pumping plant and at the top of the hill, that there the water comes out of the ditch

and comes over the track and has done so every year since witness has been in Sioux Falls. This water gets to be probably six inches over the top of the track and stands in there sometimes for probably ten days."

"At times water has been high enough around the penitentiary where the Great Northern track runs to flood its track some inches of water every year."

There is no evidence in the record to support the conclusion that the Watertown & Sioux Falls line was a part of the Great Northern system, nor is there any evidence that there is a Great Northern track running around the penitentiary. The evidence counsel evidently had in mind in making the statements referred to appears on pages 220 to 228 of the record. The witness Bassett testified that he was assistant engineer of the Great Northern Railway Company and also assistant engineer of the Watertown & Sioux Falls Railroad Company (R. 220-221); also that the water had been high enough "up around the penitentiary where the *Watertown* track goes to flood its tracks some inches of water every year."

The Watertown & Sioux Falls Railroad Company is not a party to this suit and there is no question of benefit or damage to its property involved herein. The testimony referred to, as to the flooded condition of its property, is not relevant to the issue as to whether or not the property of the Great Northern Railway Company sought to be assessed has received benefit.

IV.

THE AUTHORITIES CITED BY APPELLANTS AND THE ARGUMENT MADE BY THEM IN SUPPORT OF THEIR CONTENTION THAT THE TRIAL COURT WAS WITHOUT JURISDICTION AND THAT THIS ACTION WAS PREMATURELY BROUGHT ARE NOT APPLICABLE TO THIS CASE.

If this action were one merely to restrain the enforcement and collection of a tax or special assessment, levied by a tribunal having power and jurisdiction to make such levy, and based upon some irregularity in the proceedings of such tribunal or involving only a dispute as to the amount of the tax many of appellants contentions would be well founded.

But such is not the situation. A tribunal claimed to be acting beyond its jurisdiction and therefore without power passed a resolution attempting to proportion benefits to appellee which as will appear from a mere mathematical computation would result in the levying of taxes upon appellee's property to the amount of approximately

$5,800.00; appellee was ordered to show cause before this tribunal why such tax should not be spread upon its property; appellee was not only threatened with the levying of such a tax but with further and possibly more dangerous situation—that of having its property included within a drainage district, resulting in the extreme probability of its becoming involved in a project threatening to cause great and irreparable damage to property interests. The suggestion that under such circumstances it must first submit itself for a final determination of the questions involved to the tribunal having no jurisdiction, acting as it claims arbitrarily and without due process of law, we think has never received and never will receive the sanction of any court.

It has uniformly been held that courts of equity will intervene to prevent damage threatened by the acts of public tribunals beyond their jurisdiction and in excess of their powers. Mr. Justice Field recognized this in *Crampton v. Zabriskie*, II Otto 601, 25 L. ed. 1070, saying:

> "And from the nature of the powers exercised by municipal corporations, the great danger of their abuse and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the tax payers of a county to prevent the consummation of a wrong when the officers of those corporations assume in excess of their powers to create burdens upon property holders. * * The courts may be safely trusted to prevent the abuse of process in such cases."

The court acquired jurisdiction by virtue of both diversity of citizenship and the constitutional question involved. The amount in controversy cannot be questioned. Appellee is threatened with an assessment amounting to approximately $5,800.00, and its property will be so assessed upon its failure to show cause, before a tribunal having no power or jurisdiction, why a levy of that amount should not be spread. In addition to this is the great and irreparable damage that appellee is threatened with by having its property included within the drainage area. The action was not prematurely brought because appellee had the right at the time it instituted this action to have determined by a court of equity the question as to whether or not the appellant commissioners were acting beyond their jurisdiction and without power, and whether their proceedings would result in depriving appellee of its property without due process of law.

It is asserted that appellee had a complete and adequate remedy at law but the remedy suggested is that appellee appear before the Board of County Commissioners

and if dissatisfied appeal to the state courts. Such is not an adequate remedy. "The remedy at law must be a remedy on the law side of the Federal court, not a remedy in the state courts of South Dakota."

Chapter 3, Simkins "A Federal Equity Suit."

United States Life Insurance Co. v. Cable, 39 C. C. A. 264.

We quote from the case last cited:

"It must, we think be conceded that the bill in this case alleges facts constituting a good cause of action in equity for the cancellation of the policy, unless the plaintiff has a full and adequate remedy at law for the same cause. A suit at law has been commenced in the state court of Illinois to recover upon the policy, and, if it be an adequate remedy at law to turn the plaintiff over for litigation of its rights in the state court under the circumstances set out in the bill, then the United States Circuit Court in equity should disclaim jurisdiction. But there are two reasons why we think the remedy thus open to the plaintiff, of having its rights determined in an action at law, does not meet the requirements of the rule: The first is that the plaintiff being a citizen of New York, and the defendant a citizen of Illinois, the plaintiff, under the constitution, has the right to come to the Federal court for an adjudication. For a person entitled to litigate in the Federal court, it is not an adequate remedy at law to be invited into a state court by his antagonist to adjudicate his rights. * * * The remedy at law, in order to defeat the right to proceed in equity, should be full and adequate. It should be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. * * * In the federal courts it is well settled that the court will not turn a suitor in equity over to a remedy at law in the state courts, but only to the law side of the federal court."

The authorities cited in support of the contention that this suit was prematurely brought are easily distinguishable and their non-applicability is apparent. We find it difficult, in the manner in which the brief of appellants is prepared, to locate all the authorities on which they rely as to any particular point, and particularly as to the one now under consideration, but we call attention to the following cases cited by them which are typical and which clearly demonstrate the falsity of their position.

In *Western Union Telegraph Company v. Howe* (C. C. A.) 180 Fed. 44, there was no question of the jurisdiction of the taxing tribunal, and the court said: "The effect of

an injunction would be to take away from the tax commission all powers of discretion and judgment in arriving at a fixed and proper valuation.

The contention here and the question that this court must decide is whether or not the tribunal assuming to levy the tax has any power whatsoever.

In *Keokuk & Hamilton Bridge Company v. Salm*, 258 U. S. 122, 66 L. ed. 496, there was again no question as to the jurisdiction or power of the taxing tribunal, and the court said:

> *"Before the suit was begun it had been decided that the taxing statute was valid; that the property was subject to taxation;* that it was assessable as real estate, and that the assessment should be made as was done by the county assessor and not by the state board of equalization. *The amount of the tax was, therefore, the only matter in controversy."* (Italics are ours.)

In *Milheim v. Moffat Tunnel Improvement District*, 262 U. S. 710, 67 L. ed. 1194, chiefly relied upon by appellants, there was again no question of jurisdiction of the taxing body. Plaintiff's property there in question was included within a taxing district by the state legislature. The court said:

> "It is well settled, however, that if a proposed improvement is one which the state has authority to make and pay for by assessments on property benefited, the legislature in the exercise of the taxing power has authority to determine by the statute imposing the tax what lands may be and are in fact benefited by the improvement; and if it does so, its determination is conclusive upon the owners and the courts and cannot be assailed under the Fourteenth Amendment *unless it is wholly unwarranted and a flagrant abuse and by its arbitrary character is mere confiscation of the particular property. * * * The legislature not only provided for the assessment of the lands within the district but specifically declared that the tunnel established was of especial benefit to such lands, and that the special benefits accruing to them are in excess of the cost of the tunnel and of the assessments provided for against them."* (Italics are ours.)

Again we find no question as to the jurisdiction or power of the taxing body.

Although appellee bases its contention that this suit was not prematurely brought principally upon the claim that appellant commissioners acted entirely without jurisdiction, we believe, even if we should concede for the sake of argument that the law is constitutional; that appellant

commissioners acted pursuant to its provisions up to the time of adopting the resolution fixing the apportionment of benefits; that jurisdiction was obtained to form the so-called drainage district, and that appellee's property if benefited might be included within the boundaries thereof, it would still follow that the commissioners did not in fact acquire jurisdiction over appellee and its property because the basis upon which they acted in attempting to affect appellee's property was so arbitrary, speculative and discriminatory as to deny due process of law.

The record in this case clearly discloses that appellant commissioners never at any time had before them any evidence showing or tending to show that appellee's property would be benefited at all by the construction of the so-called Drainage Ditch No. 1 and 2. This being true it must follow that their action in adopting the resolution apportioning the benefits, so far as appellee is concerned, was based upon no foundation in fact and was therefore merely arbitrary and furnishes no jurisdictional basis for requiring appellee to appear before the appellant board and show cause why such tentative assessment should not be made permanent.

IN CONCLUSION

Appellants rely chiefly upon the decision of the state court in the case of *Gilseth v. Risty*, 46 S. D. 374, 193 N. W. 132. The opinion in that case discloses the following situation: The constitutionality of the drainage laws was not in question; plaintiff was the owner of agricultural land within the drainage area of Drainage Ditches No. 1 and No. 2 as originally constructed; he was a party to the conferences alleged in this case to have taken place between the parties interested in the original ditch proceedings and which resulted in the filing of the petition "For the Re-establishment of Drainage Ditches No. 1 and 2;" he was present at the hearing upon that petition and took no appeal from the order of the commissioners purporting to establish the new drainage; his property, as we have said, was in the drainage area as originally established; he was one of the parties responsible for the original construction of the ditches in question and for their proper maintenance, and one of the parties for whose benefit appellant commissioners are attempting to assess appellee's property and that of others outside the original drainage area.

The court simply held that as to him, a party to the proceeding, the order establishing the drainage and subsequent orders from which he did not appeal became final. A careful analysis of the opinion discloses that the court finally based its conclusion upon questions of estoppel and

lack of equity in favor of plaintiff. After reciting the situation practically as above stated, it said: "Appellant having stood by and seen all the work performed without protest, and having received all the benefits that could result therefrom, should not now be permitted to escape payment for the same. The relief asked by the appellant is equitable in its nature but, because of the circumstances above shown, all the equities of the case are against appellant and in favor of the Board."

The situation in the instant case is obviously vastly different. No part of appellee's property was within the drainage area of Ditches No. 1 and No. 2, as originally established; appellee took no part in the proceedings here in question; it owns no agricultural land and has received and will receive no benefits from the work no matter what the purpose of it may have been. The plaintiff in the *Gilseth* case was one of the persons responsible for the existence of the ditches in the first instance, and, as the facts are disclosed by the state court's opinion, his property should have been assessed for the cost of the work done for the purpose of preventing the threatened damage, regardless of whether or not such work was done under the guise of a new drainage proceeding.

The state court has never had before it for determination the question as to whether or not the drainage statutes, in so far as they purport to authorize drainage proceeding for any purpose other than draining agricultural lands, are violative of the state constitution. In all cases in which the constitutionality of the statutes has been passed upon by that court, the only questions involved are those with reference to the drainage of agricultural lands, and the court very correctly held that such drainage might be provided for without the incorporation of drainage districts.

We confidently maintain not only that the conclusions of the district court upon which its judgment was based and those of the Circuit Court of Appeals expressed in affirmance thereof are fully sustained by the record but that the judgment appealed from is also sustained because the South Dakota drainage statutes are violative of the Fourteenth Amendment to the Constitution of the United States in the particulars hereinbefore urged.

Respectfully submitted,

F. G. DORETY,
St. Paul, Minnesota.

HAROLD E. JUDGE,
Sioux Falls, South Dakota.
Solicitors for Appellee.